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Supreme Court, U.S.
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No. 04-978

IN THE

Supreme Court of the United States

D.A.S. SAND & GRAVEL, INC.,

Petitioner,

v.

ELAINE L. CHAO, United States Secretary of Labor,
MINE SAFETY & HEALTH ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

REPLY BRIEF

JAMES S. GROSSMAN
Attorney for Petitioner
One East Main Street
Suite 510
Rochester, New York 14614
(585) 325-2112

194194

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

The Respondent's Brief and the Second Circuit Court of Appeals opinion both erroneously assume that Congress intended to invoke the outer limits of its power under the Commerce Clause in the "Mine Act". Their conclusions are based on committee reports and "statutory text". These valiant efforts to stretch the intended reach of the statute fail when the statute is simply read as it is written.

Congress made a separate section of the *Mine Act* titled "*Mines subject to Coverage*". What could be more clear as to the intent of Congress regarding mines subject to the act, then a section titled "Mines subject to the Act"?

Congress was well aware that the statutory term "affecting commerce", when unqualified, indicates their desire to invoke the outer limits of their power, instead Congress qualified the statutory term in the Mine Act. Congress *did not* indicate mines which affect commerce are subject to the Mine Act. If that was intended by Congress, it would have been simple to write the statute in that fashion. Congress did not.

Congress qualified that portion of the statute specifically titled as to which "Mines are subject to the Act". The statute indicates "each . . . mine, *the products of* which enter commerce or th. *operations or products of which* affect commerce . . ." (Qualifying words emphasized).

These qualifying words are not buried somewhere in a huge statute. They are in the descriptive section of the statute titled "Mines subject to the Act." Why would Congress restrict a known statutory term in that section and attempt to undo this restriction in committee reports and other parts of the statute, as argued by respondent?

The committee reports and statute text cited by respondent and the Second Circuit do not conflict with an interpretation of the statute that does not invoke the full extent of Congress' power. The "unhealthful conditions and practices of the coal and other mines" whose products affect commerce will still be regulated. If the statute is applied as written, only small intrastate mines such as petitioners would not be regulated. This lack of regulation for such small intrastate operations would not prevent any of the statute's goals from being attained. In fact, the regulatory Agency MSHA does not regulate every mine. Instead of limiting its regulatory reach as directed by the statute, they have limited their activities by the equipment owned and used by an operator. A multiple deck screen operation is regulated, when a single deck screen is not. I fail to find these restrictions in the statute.

This court clearly emphasized in *Solid Waste Agency of Northern Cook County v. United States Army Corps. of Engineers*, 531 U.S. 159 (2001) (SWANCC); and *Jones v. United States*, 529 U.S. 848 (2000) (*Jones)* that "affect commerce" is a well known statutory term. Both cases emphasize that if the statutory term is qualified then the qualifying words must be given meaning or explained. Neither respondent, nor the Second Circuit give the qualifying words in the Mine Act meaning.

In *SWANCC*, the Chief Justice notes the burden put on respondent's interpretation of the statute:

> where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expert a clear result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative

agencies to interpret a statute to push the limit of Congressional authority.

When the requirement of a clear indication that Congress intended to invoke its outer limits of power is coupled with the requirement that words qualifying the statutory term "affects commerce" must be given meaning, it is clear petitioner's interpretation of the statute must fail. In addition the Second Circuit in its opinion completely ignores the burden discussed in *SWANCC* and ignores the qualifying words of the statute, in contradiction of both *Jones* and *SWANCC*.

The Second Circuit in its opinion gives no meaning to the qualifying words in the Mine Act. This is in direct contradiction of both of this court's decisions in *SWANCC* and *Jones*. Certiorari should be granted so that this Court can correct this error. The Second Circuit's opinion will be cited by other agencies attempting to extend their reach beyond what was authorized by Congress.

The Second Circuit's opinion also attempts to invoke the full extent of Congress' power under the commerce clause in the Mine Act, even though the statute qualifies the statutory term required for such an interpretation. The Second Circuit's opinion does not apply the requirement discussed by the Chief Justice in *SWANCC* that there is a clear indication that Congress wishes to invoke its full power under the commerce clause. These errors justify this Court granting certiorari to avoid confusion among the different circuits and to give the decisions of *SWANCC* and *Jones* the authority that was intended.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

JAMES S. GROSSMAN
Attorney for Petitioner
One East Main Street
Suite 510
Rochester, New York 14614
(585) 325-2112